NO. 5540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST and SAVINGS BANK, a Corporation, Trustee.

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division

WALTERS, PARRY and THOMAN,
E. A. WALTERS,
R. P. PARRY,
J. P. THOMAN,
Solicitors and Attorneys for Appellees.

Filed_____, 1929.

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SUBJECT INDEX

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STATEMENT OF FACTS

This is an action involving the number of acres of water rights to be sold and the state of completion of an irrigation project in the State of Idaho. The project in question is what is commonly known as a Carey Act project, made feasible in the first place through the provisions of those certain statutes of the United States com-

monly known as the Carey Act, and the statutes of the State of Idaho accepting and carrying into force and effect the terms and provisions thereof. The State of Idaho under and by virtue of the provision of its statutes (Section 2996 to 3074 inclusive, Idaho Compiled Statutes, 1919), has and does act both on its own behalf, as the owner of the water under its State Constitution, and as the representative of the settlers. In such dual capacity it is a necessary party to all contracts and proceedings relating to the extent of and ultimate completion of the system. That is, that State, in the beginnig, in accordance with the statutes, entered into a contract with the Twin Falls North Side Land & Water Company, (hereinafter for brevity called the Land & Water Company), for the construction of the system and from time to time thereafter, as any contracts or changes or alterations in contracts were required, entered into additional agreements.

Since this motion is presented solely on the pleadings, motions and affidavits it does not seem necessary to enter into a detailed account of the facts involved. The original contracts for the project were made in the year 1907, and thereafter actual construction work began and water contracts were sold to various individual entry men, who had entered tracts of land on the project. Along in 1914, and before the completion of the project, W. S. Kuhn & Company, the financial backers of the Land & Water Company, failed for a sum in the neighborhood of $75,000,000 and the Land & Water Company fell into serious financial difficulties, among other things defaulting on its bonds. The irrigation system was at that time, and for some time thereafter, in an uncompleted stage. While

this condition of affairs existed the persons owning the defaulted bonds organized and took over the project.

In 1917 the settlers became fearful that the bond holders would simply collect as much as possible on the outstanding water contracts and sell as many other contracts as possible, but would not complete the irrigation system or provide an adequate water right. To prevent this, the settlers at this time, acting through one Oliver Hill and others, filed this original action in the United States District Court in Idaho, to prevent further sale of water rights and to insure the completion of the system as provided in the original contracts.

The result of the action was that the parties stipulated that a decree should be entered limiting, for the time being the sale of water rights to a total of 170,000 acres and providing, (most important of all under the existing circumstances) that the Land & Water Company should proceed to the completion of the system to the point where it would be accepted by the State of Idaho in accordance with the terms and provisions of the contracts providing therefore. It is this old action that the present appellant is trying to "tie onto" another and separate controversy arising many years afterward.

The stipulated decree in that suit appears in the present record as Exhibit B to appellant's second proposed supplemental bill (Tr. pp. 73-77), and is referred to throughout appellant's brief as the federal decree.

We think it would perhaps assist the court in understanding the present situation to set out briefly the chronology of events since the entry of the federal decree:

December 20, 1927—Entry of federal decree. Dietrich decree).

August 6, 1920—System accepted by State of Idaho as completed in accordance with the terms of the contract (Tr. pp 77-86).

July 27, 1921—Land & Water Company and Canal Company contract that maximum sale of water rights be fixed at 185,000 (Exhibit F to Second Supplemental Complaint, (Tr. pp 87-101)).

November 8, 1921—Action filed in State Court by this appellant to attack validity of above contract and enjoin sale of more than 170,000 acres of water rights, (Tr. pp 42-43 and original Exhibits to affidavit of E. A. Walters forwarded to clerk of this court).

December 7, 1927—First Supplemental bill tendered in this action.

August 29, 1928—Second Supplemental Bill tendered in this action.

POINTS

I.

The proposed second supplemental bill presents a controversy which has no relation to, and is not germane to the original bill and decree; and which is entirely separate from, foreign to, and independent of the original controversy; and which requires the judicial determination of facts and situations which have arisen long after the entry of the original decree.

II.

The court did not abuse its discretion in denying appellant the right to file his second supplemental bill.

(A) There was, and is, another action pending in the State Court of Idaho, between the same parties and the other necessary parties, presenting the same issues.

(B) The cause of action attempted to be set out in the supplemental bill is barred by the statute of limitations of the State of Idaho.

(C) The action presents very important questions relative to alleged fraudulent acts of state officials and corporation officials which should not be and could not be determined in a summary ancilliary proceeding.

(D) The controversy proposed in the supplemental bill is futile for the reason that even if the contract be decreed void, the parties must necessarily be relegated to the procedure specifically provided for in the Dietrich decree.

III.

The proposed supplemental bill does not bring in as parties, those who are necessary parties for a complete judicial determination of the questions presented.

IV.

The court in the Dietrich decree did not retain jurisdiction over the matters attempted to be presented in the supplemental decree, but particularly provided other and different means for the settlement thereof.

V.

There was no adjudication of the merits of the controversy by the court below.

ARGUMENT.

The questions of law presented by this appeal are not at all difficult or intricate. The gist of the trial court's decision on both of the proposed Supplemental Bills was that the cause of action therein attempted to be presented was not germane to the original action and that therefore the present appellant was not entitled to file them in this action.

In our opinion then, the first step for this court is for itself to examine the issues presented by the original action, the decree entered and then the cause of action attempted to be presented in the Second Supplemental Bill. If this court determines that the Supplemental Bill is not germane to the original action, but presents a new, separate and different cause of action, that ends the investigation of the appeal for the order of the trial court must necessarily be upheld.

On the other hand, even if this court should differ with the trial court and determine that the cause of action proposed in this Second Supplemental Bill is germane to the original action, there still remains the question as to whether or not the trial court abused its discretion in refusing to allow appellant to file his Second Supplemental Bill. It must be conceded by all that even though a proposed supplemental bill be germane to the original action, it still lies within the discretion of the trial court whether the bill may be allowed to be filed. Appellant concedes this in his brief. There are some other objections which we believe prevent the appellant filing his proposed Supplemental Bill, which we shall

hereinafter mention, but as the appellant has presented the matter in his brief these two questions would seem to be determinative of the appeal.

SECOND SUPPLEMENTAL BILL IS NOT GERMANE TO ORIGINAL ACTION

The original plan was that the Land & Water Company should sell water rights for 200,000 acres and the amended bill in equity (sent up as an exhibit in this case) alleged that in 1917 the Land & Water Company had sold about that many acres and that the System was not completed and would not be by the Land & Water Company so completed. The decree entered by Judge Dietrich, then sitting as a District Judge, provided substantially two things, (a) that for the time being, the Land & Water Company should only sell and keep sold 170,000 acres of water rights and (b) that it should proceed to complete the system in accordance with its contracts with the State of Idaho, and procure the acceptance of the same by the proper officials of the state. That is, the parties agred by the stipulation, and the decree in effect found that if and when the system was completed as provided in the contracts pertaining thereto, that it would adequately supply a minimu of 170,000 acres. To that extent the Dietrich decree is res judicata, other than that it is not.

But even at that time it was within the contemplation of the parties that eventually the system might be constructed by the Land & Water Company, with a larger capacity and with more water available than was contemplated in the original contracts. Having this in mind the Dietrich decree contained language, *which is all im-*

portant in its bearing on the question now presented to this court, and which is as follows:

> "That, if at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, without violating the settlers' contracts, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined; and the question as to where the water must be measured to the contract holder under his contract with the Construction Company, and the question as to how much water must be so measured, thereunder for the purpose of determining what acreage may be irrigated above said 170,000 acres, are not covered or affected by this decree."
> (Tr. p. 76).

Viewing the Dietrich decree as a whole then, it would seem that only one question was finally determined, namely that if and when the system was completed in accordance with the State contract, it would be sufficient to irrigate 170,000 acres. On this point, the decree was final and was intended so to be and the Court did not retain any further jurisdiction over the matter.

One of the other questions present in the minds of the parties to this suit was who was to be the judge as to the completion of the system. On this point the decree provided (Tr. p. 74) that the settler should be relegated

back to his contract rights, by providing that the party to accept the irrigation system as complete should be the State of Idaho through its proper officers. Or, in other words, that it should be finally accepted by the same party as the one to be satisfied under the contracts between the Construction Company and the State of Idaho. On this point, too, the decree was final. That is, the Court did not retain any jurisdiction to itself thereafter to pass upon the completion of the system.

The third point in the minds of the parties was what would be the maximum acreage of water rights to be sold, if the Land & Water Company should construct the system to a capacity and with available water over and beyond that contemplated in the original state contract. Bear in mind that under the original contract it was thought that the system when completed according to specifications would irrigate 200,000 acres, but under the Dietrich decree it was decided that as far as the parties then knew this would only supply 170,000 acres. But the Land & Water Company was still contending strenuously that it could and would build a system which would supply water for *more* than 170,000 acres.

The parties by their stipulation, and the Court by its decree, therefore selected the one who was to be the representative of the settlers in future negotiations for fixing the maximum of water rights to be sold. The party so designated by the decree was the Canal Company (Tr. p. 76) i. e. the North Side Canal Company, Limited. The decree contemplated that the action of the Canal Company in so agreeing should be final and that the settlers on the project should be bound by the action of that Company

as their representative. Since the present appellant insists that he is a successor to some of the parties to the original suit, he therefore is bound by that provision of the decree.

It was then further provided that if the Land & Water Company and the Canal Company could not agree [they *have agreed* as is shown by the Second Supplemental Bill and particularly Exhibit F thereto (Tr. p. 87-101)], that *the Construction Company* (the Land & Water Company) could bring a suit *in any Court* of competent jurisdiction to determine the question of the maximum acreage of water rights to be sold. The decree did not contemplate that Court action would be by anyone other than the Land & Water Company; much less that any one of the settlers might raise the question by Supplemental Bills under the decree.

In other words, a complete analysis reveals that the Dietrich decree finally and definitely settled the one question then to be settled, and that by it the Court did not retain jurisdiction over or contemplate that it would have control over any further proceedings. On the contrary, it definitely provided other methods for the determination of such further questions that might arise in connection with the matter.

Having the above in mind, let us observe very briefly what the present appellant is attempting to litigate by his Second proposed Supplemental Bill. In effect, he alleges that the system has been completed and accepted in accordance with the State contracts and that the parties have, in compliance with the terms of the decree, agreed that 185,000 acres of land has been sold. He then

proceeds to claim that this acceptance of the system and the agreement are both fraudulent. He does not allege that the parties have violated the decree—of course, if they had the appellant would have his remedy of proceeding against them for contempt of court. What he actually does is to plead a new and independent action sounding in tort.

The first point raised is the sufficiency of the water supply. The Bill alleges (Tr. p 58, 66) that the present available water supply is notoriously insufficient to supply the amounts already contracted to be supplied to the settlers. We might suggest that in raising this question he is not seeking to carry the Dietrich decree into effect, but instead wants to set aside the very portion of the Dietrich decree that is final.

Necessarily, under a Supplemental Bill, the complainant *must* accept the decree. This is one very apparent reason why the proposed bill is not a proper Supplemental Bill or one in aid of the decree.

The next point attempted to be raised in the Second Proposed Supplemental Bill is that the system has not been completed in accordance with the contracts between the Land & Water Company and the State of Idaho. From the language of the Dietrich decree, and the situation of the parties to the suit is evident that the system was admitedly not completed at the date of that decree and that work still remained to be done upon the system. Therefore the Dietrich decree did not and could not determine any future controversy which might arise as to the actual completion. The decree did designate who was to be the judge, namely, the proper officials of the State of Idaho.

The Second Supplemental Bill shows on its face [Exhibit E (Tr. pp 77-87)] that the designtaed party had accepted the system as completed and that the Land & Water Company and the designated representative of the settlers, the North Side Canal Company, have agreed [Exhibit F, (Tr. pp 87-191)] that the system has been more than completed.

A suit of any kind upon the question of the completion of the irrigation system, at a date long after the entry of the Dietrich decree, of necessity seeks to litigate a new question of fact altogther, a question of fact which the Dietrich decree could not pass upon. When the complainant alleges in his proposed supplemental bill that the irrigation system is not completed according to the contracts of the construction company with the State, he says that his rights are not based upon the Dietrich decree but in fact depend upon what has taken place since the entry of that decree. The general purpose of a Supplemental Bill is to carry into effect a previous decree. There is nothing in the Dietrich decree which adjudicates anything else than that the system was not completed at the date of the decree. The question whether the system was complete or otherwise at the date of the proposed Supplemental Bill does not depend upon the Dietrich decree. It is answered yes or no according to the intrinsic facts and not by anything said in the Dietrich decree. We therefore say that carrying the Dietrich decree into effect does not solve for us or for the court the question whether the irrigation system was completed or not at the date of the proposed bil. The Dietrich decree is useless upon that question, and if useless, the complainant's present at-

tempt to revive it ought rightly to be discouraged.

The next allegation of the proposed bill is that the construction company is wrongfully selling water rights for over 170,000 acres of land.

As we have seen, the Second Supplemental Bill shows on its face that the parties have agreed (Exhibit F, to said Supplemental Bill) that there may be sold and kept sold, water rights to the extent of 185,000 acres on this project. Therefore, the allegations in the bill that there is not water enough for such additional land and that there is not increased capacity, does not and cannot allege a violation of the Dietrich decree, but is only an attempt to plead evidence to lay a ground work for and support the oft-repeated legal conclusion that the acceptance of the system as completed (Exhibit E) and the agreement for the sale of 185,000 acrs (Exhibit F) are fraudulent and therefore void. But, at first reading, these allegations seem to plead a violation of the decree as appellant contends for. An analysis of the pleading shows they are only the elements of the fraud he charges in entering into the contract. In other words, the question which he wants to litigate now is not whether the parties are violaing the Dietrich decree, but is solely and only an attempt to litigate a charge prefererd by one settler that the officials of the State of Idaho and the North Side Canal Company, the designated representative of the settlers, have acted fraudulently. These are questions that were undreamed of at the time of the Dietrich decree, and were not in any way considered or decided by Judge Dietrich in entering that decree. Neither was the question whether there is in fact sufficient water, or an en-

larged capacity in the irrigation system, decided in the Dietrich decree, for all those things were matters that lay in the future.

Just as pointed out in our consideration of the previous question, any rights of the complainant to prevent the sale of water rights for land in excess of 170,000 acres does not depend upon any matters finally determined by the Dietrich decree. The complainant must prove that there is insufficient water available to irrigate the additional acreage, as to which there is no possible finding in the Dietrich decree, and also that the irrigation system has not been enlarged to a capacity sufficient to admit of it serving additional acreage over 170,000, upon which point the Dietrich decree could not possibly make any finding. To make a case under this head the complainant must prove new and independent elements not settled by the Dietrich decree. In such circumstances the proposed bill cannot be proper.

The proposed bill seeks to make itself a continuation of the former case by alleging fraud upon the part of those named to act as arbiters for the settlers. It alleges a fraudulent acceptance by the State Commissioner of Reclamation of the irrigation system as complete, and a fraudulent conspiracy of the North Side Canal Company to permit the sale of water rights for more than 170,000 acres. If there is fraud in any transaction under either of those heads it is fraud as to matters of fact since the date of the Dietrich decree. Whether or not the system is completed in accordance with the contracts of the construction company with the State of Idaho, and whether or not the water supply taken in connection with the

capacity of the system will supply over 170,000 are questions which necessarily depend upon the conditions at the time of tendering the proposed bill, and not upon conditions at the date of the Dietrich decree, for the Dietrich decree assumes an incomlete system, with alterations and changes going on and to continue to some time in the future.

Under both charges the complainant must prove more than would be necessary in a mere controversy over whether the system has been completed or not, or over whether water right and canal capacity permit the irrigation of over 170,000 acres. Under the first charge, he must show that the irrigation system at the date of the bill was so far from being completed that there could not be room for an honest difference of opinion upon hat point. Under the second charge, he must show that the water supply and canal capacity is so notoriously inadequate that there could not be any reasonable doubt upon the point. We before said that all these things were matters of fuure development at the date of the Dietrich decree, that the Dietrich decree did not attempt to pass upon them, did not reserve them for future orders, but in fact did the direct opposite by saying that in the event of disputes over the number of acres capable of being irrigated such questions should be settled in another suit, brought by the Land and Water Company.

What is the purpose of a supplemental bill? In Root v. Woolworth, 150 US 401, 14 S.Ct. 136, 37 L Ed. 1123, its purpose is said to be the avoidance of relitigation of questions once settled between the parties. We examine the reported cases upon supplemental bills and find that

the rights sought to be protected by such bills are rights based upon the decree itself, based upon a direct, final adjudication of the court upon matters of fact presented to the court and decided by it in the decree which is sought to be carried into effect, and that in none of them is a supplemental bill permitted to be used to ask a new adjudication upon new facts as to which the former decree is not res adjudicata. These conclusions are drawn from the following cases:

> Root v. Woolworth, supra.
> Western Telephone Mfg. Co. v. American Electric Co., 141 Fed. 998.
> Central Trust Co. v. Western N. C. R. Co., 89 Fed. 25.
> Milwaukee & Minnesota R. R. Co. v. Milwaukee & St. Paul R. R. Co., 6 Wall. 742, 18 L. Ed. 856.
> Independent Coal & Coke Co. v. United tSates, 274 US 640, 47 S. Ct. 714.
> Rudiger v. Coleman, 126 NE 723, N. Y.
> Austin v. Hayden, 157 NW 93, Mich.

It is our contention that to be a proper supplemental bill the source of the rights of the complainant must be the former dlecree, that the complainant must be able to say to his adversary: "Here is my decree—your acts are in violation of that which this decree has already settled in my favor.' If he cannot say that his rights are settled by the former decree he has no proper supplemental bill.

> "But such bill must, both in a proper and legal sense, be an ancillary bill; it must, in fact, be only a continuation of the original suit, that is, it must relate to some matter already litigated by the same parties or their representatives. If the

bill contains matter not before litigated by the same parties standing in the same interests, that is, if new parties are brought in, and new matter charged as a basis of relief, then the bill is not an ancillary, but original bill, and cannot be supported by the former suit, but must stand independently on its parties and subject-matter for jurisdiction Union Cent. L. Ins. Co. v. Phillips, 41 C. C. A. 263, 102 Fed. 19; Anglo-Florida Phosphate Co. v. McKibben, 13 C. C. A. 36, 23 US App. 675, 65 Fed. 529; Raphael v. Trask, 118 Fed. 777; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610; Shinney v. North American Sav. Loan & Bldg. Co. 971 Fed.9"

Simkins Federal Practice, Revised Edition.
Pages 756-757.

The Dietrich decree, as before shown, determined the single point that the canal system, if completed according to the contracts of the construction company with the State of Idaho, would in connection with the water right then available, irrigate 170,000 acres of land. Nothing else was adjudicated by such decree. The purpose of the present bill is to present to the court for adjudication the questions whether the canal system is completed as required by such contracts, and whether there has been such an enlargment of the system over such requirements, as would in connection with the water right actually acquired irrigate more than 17,000 acres of land. The Dietrich decree said nothing about the completion of the system; it could not do so, for the system was then admittedly incomplete. This supplemental bill therefore does not depend upon the Dietrich decree, but instead originates an entirely new question.| Likewise that decree could not and did not adjudicte any dispute over whether

there was such an enlargement of the system as would permit more than 170,000 acres of land to be irrigated. In raising that question now, the bill brings up entirely new matter. *No question raised by the supplemental bill was adjudicted by the Dietrich decree.* The relief demanded in that bill must flow from a new adjudication by the court upon new facts, none of which were or could be presented in the former case. It is not relief that is derived from, ancillary to, or dependent upon the former decree. Complainant must bring a new action.

COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOTION TO FILE SUPPLEMENTAL BILL

Thus far in this brief we have discussed the question as to whether or not the proposed Second Supplemental Bill was germane to the original action. Or to put it another way, whether there was such a foundation as would justify the Court in applying its discretion to the matter at all. However, even if this Court should disagree with us on this point and determine that the Bill is germane (which we do not admit), still there was more than ample ground for the trial Court, in his wise discretion, to deny the motion to file the Second Supplemental Bill. That is, rather than there being an abuse of discretion, as appellant argues, it is a case where there would have been much more room for arguing that the Court had abused its discretion if it had granted the motion. But in any view, there was sufficient possibility for a divergence of opinion to make the matter one lying solely in the discretion of the trial Court.

A. *Pendency of Another Action Involving the Same Parties and Issues.*

For instance, one of the first facts to appear when the trial Court studied this matter was that on November 8th, 1921, the same gentleman who is the appellant here, instituted an action in the State Courts of the State of Idaho, involving the same issues as are now attempted to be injected into this action in rather a "side door" manner. This appears in the objection filed by the present appellees (Tr. p 37-38), supported by the affidavit of E. A. Walters (Tr. p 42-43). To this latter affidavit there is attached copies of the complaint and answer in the States Court suit, which have been sent up to this Court as original exhibits by the Clerk of the District Court (Note, Tr. p 43).

It only takes a moment's inspection of these pleadings to see that the State Court action presents the identical issues as those now attempted to be inserted in this action. Further that action is at issue and ready for trial. Also in the State Court action, all possible parties are present in Court so that a complete determination of the whole matter may be had in that action at any time the present appellant desires.

Why was not the trial Court, then, exercising its sound discretion when it said in substance to the present appellant, you already have an action pending in the State Court at issue and ready for trial, presenting the same questions, and there is no need for a Supplemental Bill in this action?

B. *Cause of Action Set Out in Supplemental Bill Barred by Statute of Limitations.*

Another excellent reason for the trial Court exercising its sound discretion in refusing the tendered Supplemental Bill is that the cause of action attempted to be set forth is barred by the Statute of Limitations of the Sates of Idaho. This objection was specifically raised by the appellees in their objection to the Second Supplemental Bill (Tr. p 103). The reason that we say this Cause of Action is barred, is substantially this: the present action is in its last analysis nothing more or less than an attempt to have declared void a certain contract between the Land & Water Company, the Canal Company, and the tSate of Idaho, on the ground that it is vitiated by fraud. The Statutes of the State of Idaho are clear that actions founded on such fraud must be brought within three years (Sec. 6611 I. C. S.). Or in any event it is barred by the general Idaho statute providing the four year limitation (Sec. 6617 I. C. S.). The act of the state official in accepting the system occurred August 6th, 1920. The contract in question was signed July 27th, 1921. The prescribed time for bringing an action against either of these acts on the ground of fraud or any other ground had long expired. It is this act and this contract alone that appellant is now seeking to attack.

Appellant attempts to wave this very serious objection aside by stating that the statute of limitations does not run against the decree of a court. Of course, we concede this and would not be so absurd as to contend otherwise. The point is that in this action there is no decree on the issues counsel wants to have litigated and that

the question to be presented to the court, if the Supplemenal Bill be filed, are questions as to the validity of the acts of the State officials and the validity of the contract. Both of these involve the question of fraud and fraud alone, and the time for attacking them on that ground had long expired when the present Bill was tendered.

Can it be said then that the trial court abused its discretion in denying the motion to file the Supplemental Bill where this fact that the action was barred appeared on the face of the Supplemental Bill? Surely the Court is not abusing its discretion when it refuses to take up its own time and that of litigants with an action which is barred on its face.

C. *Important Questions of Fraud Presented Should Not be Tried in a Summary Proceedings.*

Another very cogent reason why the trial court was exercising its sound discretion in denying the right to file the Second Supplemental Bill, is the character of the issues attempted to be presented to the court. The bill makes very serious charges; it charges state officials with gross neglect of duty, conspiracy and actual and deliberate fraud, it charges the officials of the North Side Canal Company, the settlers' operating company, and the Land & Water Company with gross and deliberate fraud. As we understand it, the question of whether or not a fraud is committed, presents a law question. This is an equity case.

These questions of later fraudulent acts are entirely foreign to and independent of the original proceedings, and certainly the trial court is entirely justified in re-

fusing to, itself, dispose of them in a summary proceedings of this character and in refusing to compel the state officials to have the validity of their acts contested without their being present, and the validity of the acts of the North Side Canal Company decided without their having the benefit of a jury trial. It requires only a hasty look at any text book upon the subject, to observe that a Supplemental Bill is designed only to present matters ancillary to the original case. Here the matters presented are serious in their import, entirely foreign to the original action, relate to matters happening long after the original decree, and affect many parties. Counsel has cited no authority and we know of no law which would compel a court to try such a case in a summary proceedings under a Supplemental Bill. Again we say that on this ground, too, the Court exercised its sound discretion in denying the right to file the Supplemental Bill. Especially was this true when there was already pending this action action in the State Court presenting the proper issues and with all of the affected parties present.

D. *Futility of this Proceeding.*

Upon the the oral argument of the last motion, Judge Cavanah, the District Judge, stated in shbstance that in his opinion the only question presented by the Second Supplemental Bill was whether the contract, (Exhibit F) was valid and that even if he should determine that was invalid because of fraud, that then the parties would be relegated back to the procedure specifically provided for in the Dietrich decree. That is, that if in a proper action (the State Court action) the contract is declared void, that then and in that event the question as to the

amount of acreage ultimately to be sold must be judicially determined in a court of competent jurisdiction in an action brought by the Land & Water Company as specifically provided in the Dietrich decree. This observation by the trial court was to our mind, eminently correct and another of the main reasons why he was justified in exercising his discretion as he did.

And the trial court particularly protected appellant's rights in this regard when he provided in his first memorandum decision (Tr. p 52) that he could bring a proper action with all of the parties to the contract present and provided in his order (Tr. p 53) that the motion was denied without prejudice.

Summarizing al of the above matters then, there can be no question that the matter was such that, even if the Supplemental Bill were germane, the sound discretion of the trial court was called into play and that the court had every substantial reason for exercising its discretion as it did.

NECESSARY PARTIES FOR COMPLETE DETERMINATION OF CONTROVERSY NOT PRESENT

The original action was one solely between the settlers on the one hand and the Land & Water Company and the Trustee for its bond holders on the other hand. The fact is inescapable that the present proposed supplemental bill presents an issue as to the validity of a three party contract between the Land & Water Company, the North Side Canal Company and the State of Idaho. The objection that the proposed bill did not bring into court the parties necessary for determination of the matter was

aptly raised by the appellees in their objection (Paragraph 5, Tr. p 41).

It is true that in the second bill the appellant offers to bring in the North Side Canal Company, Limited, if it is deemed necessary. We pass over the questionable efficacy of this method of claiming that the Canal Company has been made a party. Even if it has been there still remains missing the State of Idaho.

The State of Idaho is interested in this action in a dual capacity. In the first place it has a direct and real interest in the action since it involves the application of certain water for irrigation purposes. Under the provisions of Article XV, Section 1, of the Idaho Constitution, it is provided that the use of the water of the State of Idaho is a public use and under the unvaried line of decisions in the State of Idaho, the title to all the water is held to be in the state and that the individual owner has only the right to the use thereof:

> Walbridge v. Robinson, 22 Idaho 236, 125 Pac. 812
> Coulson v. Springfield Aberdeen Canal Co. 39 Idaho 320, 227 Pac. 29.

Therefore in arriving at the final determination as to how many acres of land were to be irrigated with the water available for this project the State was vitally interested. It would not and could not sit by and allow private individuals to restrict the waer to a smaller area than could actually be beneficially irrigated by it.

Further than this, with reference to such Carey Act projects the State of Idaho was the trustee of an express trust under the provisions of the Federal statutes

known as the Carey Act. And by its own statutes (Sections 2996-3074 Idaho Compiled Statutes, 1919), the State retained a direct and specific interest and right of control over the method of construction, extent and state of completion of all Carey Act projects. In view of these statutory provisions it would seem that the State would be a necessary party to the action even if it were not a party to the contract in question.

But we do not need to consider this more or less academic question for the reason that the State of Idaho was a party to the contract, which appellant now claims was fraudulently entered into. It was the state officials who accepted the project as completed, an act which appellant now says was fraudulent. Surely the trial court was well within his right when he held that he would not determine a question so vitally affecting the state and its officials without their being present in court. For the court to have attempted to determine the rights of the State of Idaho, without it being present in court, would of course have been erroneous. To deny a bill which sought to do this could not have possibly been an abuse of discretion.

COURT DID NOT RETAIN JURISDICTION

Another legal reason why the proposed supplemental was not proper is that the court in Dietrich decree did not in any way retain jurisdiction over the matters sought to be presented in the supplemental bill. Reduced to its last analysis appellants theory apparently is that because one phase of the controversy involving the North Side project was determined in this action that thereafter, by a supplemental bill he can have determined

in the case each and all and every controversy arising within the next two decades affecting the same project Not only did the court in the Dietrich decree not retain jurisdiction but it particularly provided other methods of determining these very questions, which appellant now seeks to raise. Since it did not specifically retain jurisdiction over them, appellant has no legal right to now have these other and independent controversies litigated in this action.

NO ADJUDICATION OF MERITS

Apparently as the last desparate attempt to reverse the District Court, appellant contends that there was an adjudication of the merits of the controversy. His argument savors very much of the old time jury expedient of setting up a straw man and then knocking it down. For there is nothing in either the memorandum decisions of the trial court or the orders entered, which in any way purported to be an adjudication of the merits of the case. Appellant's whole premise on this phase of the matter is derived apparently from certain language used by Judge Cavanah in his memorandum decision. Naturally, in discussing the history of the matter he used the language that the parties had entered into an agreement that additional water rights could be sold. He did not intend to hold, nor did he determine that this was valid, nor would any reasonable man reading his opinion, arrive at the idea that he was upholding the validity upon the procedure. He simply commented that the parties had so proceeded.

Of course the judgment of the Court is that ex-

pressed in the two orders entered (Tr. p 53, 105). There is nothing in either of these orders which could ever be plead as an adjudication on the merits. Counsel for appellant expresses the fear that if the present proceedings be allowed to stand that we would plead Judge Cavanah's orders as a judgment on the merits in the State Court case. Counsel for appellant is too good a lawyer to urge this point with any energy. He would be the first to make proper objection in the event that we attempted any such procedure. In his first memorandum decision (Tr. p 52) the trial court first specifically stated that the ground for his decision was that the Supplemental Bill was not germane to the original action and then went on to state that:

> "If a stockholder feels that his company has jeopardized his rights in entering into the agreement in question, he can avail himself of the remedy provided by law in a proper action, and bring in all the parties to the contract." (Tr. p 52).

In his second memorandum decision (Tr. p 104-105) the trial court expressly adopted the reasons set forth in his first memorandum decision. Therefore, when counsel urges that there was an adjudication on merits, he is going contrary to the express language of the trial court. There was only one question determined in the court below, and that was that these proposed Supplemenal Bills were not entitled to be filed, and the appellant lost nothing except the right to file these bills. After the entry of Judge Cavanah's order, and at the present time, the appellant has all of the rights and remedies affecting this contract that he possessed on the day he tendered the

Supplemental Bill. The decisions and orders of Judge Cavanah in no way deprived him of any remedy or right to proceed that he would otherwise have. There is nothing any place in the record to show that the trial judge, in any way, considered or decided the merits of the controversy, and to isolate that portion of his decision where he commented on the fact that the parties had proceeded along the lines provided in the Dietrich decree, does not change this situation. Counsel has attempted to single out a small portion of the opinion and hang his whole case on it, rather than presenting the opinion as a whole.

CONCLUSION.

We can only summarize what we have said above by again stating that it is very clear that the controversy sought to be presented in the Supplemental Bill is not one that was in any way adjudicated by the Dietrich decree, but is an entirely new, different, and independent one. And this, we believe is entirely determinative of the case.

Even if it were germane, the fact of the pendency of the other action in the State Court; the fact that appellant's acion is on is face barred by the statute of limitations; and the fact that it is an attempt to try a fraud case in a summary proceedings; and the many other reasons why the court was entitled to exercise at his discretion as he did, all show that there was no abuse of discretion. The case clearly comes within the rule announced in one of the cases cited by appellant:

> "Granting or refusing leave to file a supplemental bill is usually in the discretion of the trial court, and where its order refusing such

> leave is not an adjudication of the merits, but leaves it open to complainant to obtain such adjudication by a new bill, it will not be reversed by the appellate court."
>
> Rosemary Mfg. Co. v. Halifax Cotton Mills, 266 Fed. 363. (syllabus).

The proposed Supplemental Bill seeks to have a new adjudication upon new facts not determined by the Dietrich decree. The order of the court does not bar another action; another action is actually pending in the State Court upon the same facts; the proper parties are not before the court for a complete determination of the controversy presented, while on the other hand they are present in the State Court case. For all of these reasons the court below was entirely correct and did not abuse its discretion in denying the right to file the Supplemental Bill. It is assuredly not the policy of the law that the appellees herein should be harrassed by being compelled to face the action pending in the State Court and also this attempted reopening of this old and entirely different case more than ten years after the entry of the decree therein.

We respectfully submit that the order of the trial court should be affirmed.

Respectfully submitted,

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